No. 48278-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KENNETH FLYTE, as personal representative of THE ESTATE OF KATHRYN FLYTE, on behalf of their son JACOB FLYTE,

Respondents/Cross-Appellants,

v.

SUMMIT VIEW CLINIC,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE RONALD E. CULPEPPER

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

Summit View Clinic was denied a fair trial when the jury was exposed to extrinsic evidence, inadmissible evidence of claims not at issue, and inflammatory closing argument. This Court should reject Mr. Flyte's argument – erroneously accepted by the trial court – that a mistrial for juror misconduct is warranted only when jurors deliberately engage in misconduct, and only when the extrinsic evidence actually prejudiced the verdict. This Court should also reject Mr. Flyte's argument that a party may without consequence introduce evidence of claims that were voluntarily dismissed pretrial and at no point reinstated during trial. In light of the excessive $16.7 million verdict, which was unsupported by the evidence and the product of plaintiff's argument that the jury should punish Summit View, this Court should reverse and remand for a new trial.

II. ARGUMENT

A. The trial court erred in denying the Clinic's motion for a mistrial or to discharge two jurors after the jury was indisputably exposed to extrinsic evidence.

A trial court abuses its discretion if its ruling is based on untenable grounds or is manifestly unreasonable. *Teter v. Deck*, 174 Wn.2d 207, 215, ¶15, 274 P.3d 336 (2012). The trial court necessarily abuses its discretion when it applies the wrong legal standard. *Reese*

v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995); *Fraser v. Beutel*, 56 Wn. App. 725, 734, 785 P.2d 470 (trial court abuses its discretion where reason for exclusion of evidence is contrary to law), *rev. denied*, 114 Wn.2d 1025 (1990). Plaintiff concedes that a trial court decision rests on untenable grounds if it "was reached by applying the wrong legal standard," and is manifestly unreasonable if "the court, despite applying the *correct* legal standard . . . adopts a view 'that no reasonable person would take.'" (Resp. Br. 35) (emphasis added) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Here, the jury was indisputably exposed to extrinsic evidence, which the trial court itself deemed improper. (*See* RP 801-02, 805-06) But the trial court applied the wrong legal standard and necessarily abused its discretion by analyzing whether the H1N1 chart displayed in the jury room actually prejudiced the verdict before a verdict was even reached. That legal error compels a new trial.

1. The trial court applied the wrong legal standard by probing the jurors' mental processes, which inhere in the verdict.

Despite plaintiff's contrary argument (Resp. Br. 32-33), the Clinic clearly recognized that the H1N1 poster was prejudicial under the correct objective standard. (*See* Opening Br. 28-31) When, as here, "it is undisputed that the jury received evidence that it should

not have seen, the critical question that remains is whether the jury's receipt of this evidence prejudiced [a party]." *State v. Pete*, 152 Wn.2d 546, 554, 98 P.3d 803 (2004). The proper legal test to determine prejudice is "an objective inquiry into whether the extrinsic evidence *could* have affected the jury's determination, not a subjective inquiry" into whether it actually did. *Kuhn v. Schnall*, 155 Wn. App. 560, 575, ¶45, 228 P.3d 828 (emphasis added), *rev. denied*, 169 Wn.2d 1024 (2010). Any reasonable doubt that the party was denied a fair trial must be resolved against the verdict. *Turner v. Stime*, 153 Wn. App. 581, 593, ¶¶36, 39, 222 P.3d 1243 (2009).

The H1N1 poster went directly to the disputed fact at issue. Whether Dr. Marsh should have informed Ms. Flyte of the option of treatment with Tamiflu was *the* highly contested issue at trial. That issue turned almost exclusively on whether or not a fever always accompanies H1N1, and, in turn, whether "chills and sweats equal fever." (*See* RP 465, 467, 609, 738-40, 773, 865, 873, 965-66, 1060, 1073, 1085, 1174-75, 1178, 1315, 1321, 1323, 1339, 1401, 1408-10, 1414-15, 1444, 1508, 1549-51, 1916, 1951, 2022, 2024-26, 2061) The trial court itself recognized that "[c]ertainly the difference in these symptoms is *a major issue*" in the case, and admitted the highly prejudicial effect that the H1N1 poster *could* have given that it "might

be deemed as somehow authoritative or objective because it was posted by the Court in the jury room."[1] (RP 801-02) (emphasis added) Juror 8 shared this sentiment, noting that she had "been told to disregard anything outside of the courtroom, *although this kind of is in the courtroom.*" (RP 791) (emphasis added)

The trial court clearly had reasonable doubt that the H1N1 poster could influence the verdict, noting that "had [the chart] been reviewed by the jurors, . . . we would have a problem." (RP 805-06) But it was undisputed that Jurors 4 and 8 had "reviewed" a significant portion of the poster. (RP 776-77, 793) The trial court erroneously denied the defense motion for a mistrial *solely* based on its subjective inquiry into the *actual* effect the poster might have on the jury – despite the fact that the two jurors questioned gave conflicting and inconsistent answers to the court and the judicial assistant regarding how much of the poster they had reviewed. (RP

[1] Plaintiff asserts "[i]t should be noted that the poster at issue was not prominently displayed." (Resp. Br. 34) That two jurors saw the H1N1 poster by the third day of trial proves that it was in plain view and could have previously been seen by other jurors who did not inform the trial court of its existence. At the very least, it raises a reasonable doubt whether other jurors could have seen and been prejudiced by it. Plaintiff's subjective assessment of how prominently the poster was displayed relies upon the same incorrect legal inquiry that the trial court engaged in by speculating the *actual* effect that the poster, given its size and placement, had on the jury, rather than the effect that it *could* have on any verdict.

786, 789, 791, 793) By basing its decision on the anticipated mental processes of the jurors, which would inhere in the verdict (Opening Br. 23-29) rather than on an objective inquiry into the prejudicial effect that the evidence could have on the jury and the verdict, the trial court applied the wrong legal standard.

2. The trial court erred in concluding that there was no misconduct because the jurors had been inadvertently exposed to extrinsic evidence.

A juror's inadvertent exposure to extrinsic evidence is "misconduct" that may warrant a mistrial. *See Fritsch v. J.J. Newberry's, Inc.*, 43 Wn. App. 904, 907, 720 P.2d 845 (it is "the injection of evidence outside the record during jury deliberations affecting a material issue in the case [that] constitutes misconduct"), *rev. denied*, 107 Wn.2d 1006 (1986). None of the cases plaintiff cites supports his argument that "[t]he case law is supportive" that a new trial was not warranted because the "purported juror misconduct" was "only juror 'good conduct.'" (Resp. Br. 31)

In *Barnes v. Central Washington Deaconess Hosp., Inc.*, 5 Wn. App. 13, 14-15, 485 P.2d 85 (1971) (Resp. Br. 31), a medical malpractice suit, the trial court denied plaintiff's motion for a new trial made after the local newspaper published an article entitled "Malpractice Suits Add to Rising Medical Costs" during trial. On

appeal, the plaintiff failed to include any of the testimony or exhibits in the record, which was "limited to a copy of the newspaper article, discussions between court and counsel as to the article, together with posttrial colloquy and jurors' affidavits in support of a motion for new trial." *Barnes*, 5 Wn. App. at 14. Given the state of the record, the appellate court was "unable" to find that the trial court abused its discretion in denying the motion for a new trial because "[t]he trial judge had the benefit of seeing and hearing all of the witnesses and evidence, *none of which [wa]s available*" on appeal. *Barnes*, 5 Wn. App. at 16 (emphasis added).

Barnes stands for the unremarkable proposition that where the record on appeal is so limited that the court cannot adequately assess the prejudicial nature of the extrinsic evidence, "the mere publication of an article in a newspaper, making no specific reference to a case on trial but dealing with its general subject matter, which is read by jurors," is not "ipso facto grounds for a new trial." 5 Wn. App. at 16. In this case, contrary to *Barnes,* this Court has a complete record on appeal, including all of the evidence and testimony concerning whether chills and sweats equal a fever, and whether H1N1 always presented with a fever. That record establishes the

prejudicial nature of the H1N1 poster because it *could* have affected the verdict.

In addition, the extrinsic evidence in *Barnes* a newspaper article – dealt with the *general* subject matter of the trial, medical malpractice. Here, the jury room poster dealt with a specific and highly contested fact that went to the ultimate issue before the jury: whether or not Dr. Marsh should have ruled out H1N1 based on Ms. Flyte's lack of a fever when she presented with chills at her doctor's appointment.

Finally, unlike the plaintiff in *Barnes*, the Clinic is not arguing that the chart is "ipso facto" grounds for a new trial. Rather, a new trial is warranted here because the H1N1 poster went to a major issue at trial and was posted in the jury room *by the court* – giving an authoritative quality to an ultimate fact in issue.

Plaintiff's reliance on *Kellerher v. Porter*, 29 Wn.2d 650, 189 P.2d 223 (1948) and *Tarabochia v. Johnson Line, Inc.*, 73 Wn.2d 751, 440 P.2d 187 (1968) (Resp. Br. 32), is similarly misplaced. Unlike here, where the jury was indisputably exposed to extraneous information, neither jury in *Kellerher* nor *Tarabochia* was actually exposed to extrinsic evidence.

The plaintiff in *Kellerher* sued for damages arising from a fatal automobile collision. 29 Wn.2d at 654. During deliberations, the jurors discussed insurance "in a general way," considering whether the defendants were likely insured. *Kellerher*, 29 Wn.2d at 663. The Supreme Court affirmed the trial court's denial of plaintiff's motion for a new trial based on juror misconduct. The conduct of the deliberating jury in *Kellerher* is in no way analogous to the present case. There, the alleged misconduct was general juror speculation whether the defendant had insurance – absent any extrinsic evidence or outside knowledge of the veracity of such conjecture. Where the jurors had not been exposed to any extrinsic evidence and were merely questioning and hypothesizing in the abstract whether the defendant had insurance, the discussions well inhered in the verdict. *Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131-32, ¶¶7-8, 368 P.3d 478 (2016).

The Court in *Kellerher* "*assum[ed]*" without deciding "that the 'talk about insurance' during deliberations was improper." 29 Wn.2d at 664 (emphasis added). In contrast, here it is undisputed that the jury was exposed to extrinsic evidence; the trial court itself noted the impropriety of the H1N1 poster in the jury room, sharing the defense's concern that the chart could be construed as authoritative

because it was posted by the court. (RP 801-02, 805-06) Additionally, the plaintiff in *Kellerher* did not claim that the trial court applied the wrong legal standard in denying the motion for a new trial, merely that it reached the wrong decision. In contrast, the trial court here applied an incorrect subjective standard to hold that Summit View had the burden of proving that the information actually affected the jurors' thought processes, necessarily abusing its discretion in denying the motion for a mistrial.

Plaintiff then relies on *Tarabochia* to argue "there is not even juror misconduct if they choose to do their own experimentation." (Resp. Br. 32) But as in *Kellerher* (and unlike here), the jury in *Tarabochia* was not actually exposed to any extrinsic evidence. 73 Wn.2d at 754 ("There is nothing to indicate that the jurors obtained new evidence which was not introduced at trial.").

In particular, *Tarabochia* provides no support for plaintiff's contention that to set aside a verdict for misconduct stemming from a jury experiment, "it must be shown that the experiment resulted in prejudice to the complaining party" and "that such evidence influenced [the] verdict." (Resp. Br. 32) To the contrary, the *Tarabochia* Court reiterated "the rule that it is not necessary to show that an experiment influenced the verdict, but only to show that it

was *likely* to do so," 73 Wn.2d at 754 (emphasis added) – that is, the court should not examine the jurors' actual thought processes. In the decades since the Supreme Court decided *Tarabochia*, it has further clarified that the test is not whether the evidence actually *did* prejudice a party in the jury's deliberations, but whether the trial court "ha[d] *any reasonable doubt* that the information prejudicially affected the verdict." *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 137, 750 P.2d 1257 (emphasis added), *as clarified in* 756 P.2d 142 (1988).

Plaintiff mischaracterizes *State v. Rinkes*, 70 Wn.2d 854, 425 P.2d 658 (1967) in arguing that "[n]otably, the actual prejudicial article was introduced into the jury which material was clearly intended to influence readers of it to be concerned about purported leniency of area judges to alleged criminals" in *Rinkes*. (Resp. Br. 33) *Rinkes* is instructive because it deals with extrinsic evidence that was inadvertently – through no fault of the jurors – introduced into the jury room, just as the H1N1 poster was introduced into the jury room in this case. The Supreme Court thus held that the inadvertent exposure to extrinsic evidence can compel a new trial "when there is a reasonable ground to believe that the defendant *may* have been prejudiced." *Rinkes*, 70 Wn.2d at 862 (emphasis added). Just as in

Rinkes, although the H1N1 poster was not intended to influence the jurors in this case, it *could* have had that effect.

Because the misconduct here occurred during trial, as opposed to during deliberations, the trial court had an opportunity, and an obligation, to ensure any verdict was not tainted, by granting a mistrial. Instead, the trial court predicted the effect that extrinsic evidence *might* have on the jury's verdict, by speculatively probing the jurors' mental processes. The trial court abused its discretion by "speculat[ing] at great risk to the defendants" the "potential taint" that the extrinsic evidence could have. *Rinkes*, 70 Wn.2d at 863. Just as in *Rinkes*, this Court is "compelled to assume that the requisite balance of impartiality was upset" by the H1N1 poster, and grant a new trial. 70 Wn.2d at 863. Because there is reasonable ground to believe the Clinic may have been prejudiced by the jury room poster, the trial court erred in denying the Clinic's motion for a mistrial or to dismiss the jurors because it did not think the poster *would* have an actual effect on the verdict, and because it did not like the idea of calling the jury's exposure to the poster "misconduct." (12/1 RP 32)

B. Plaintiff's repeated violation of orders in limine and reliance on inadmissible and irrelevant evidence severely prejudiced the Clinic's defense.

1. Plaintiff introduced evidence of standard of care and wrongful life claims that he had voluntarily dismissed before trial.

Prior to trial, Mr. Flyte dismissed any claims of medical negligence and all claims arising from Abbigail Flyte's death. (RP 12, 42, 49-50, 56, 101-02) Plaintiff now contends that he merely "forewarn[ed] the Clinic's lawyers that the standard of care claims would be dropped at the end of the case" by "providing advance notice of the intention to drop the standard of care claims after the close of evidence." (Resp. Br. 22) Ignoring the trial court's oral dismissal, the order in limine and the Clinic's reliance on those rulings, plaintiff argues that "the standard of care claim was still legally a part of the ongoing trial" and thus "the Flyte family retained the right to pursue those claims" and introduce evidence of negligence until the trial court signed the order formally dismissing the standard of care claims at the close of trial on October 27, 2015. (Resp. Br. 22; CP 193-96)

This procedural sophistry comes remarkably close to an admission of the prejudice caused by plaintiff's misconduct. The fact that the trial court did not enter the written order dismissing the

standard of care and wrongful death claims until the end of trial does not mean that plaintiff had a free pass to present evidence of those claims throughout trial without first moving the court to reinstate them. Had Mr. Flyte sought to reinstate the claims after the trial court had orally dismissed them, he would have had to move the court to reconsider his voluntary dismissal. *See Hubbard v. Scroggin*, 68 Wn. App. 883, 887, 846 P.2d 580, *rev. denied*, 122 Wn.2d 1004 (1993).

Instead, the trial went ahead with the understanding by *both* parties *and* the court that there were no negligence or wrongful death claims left in the case. After Mr. Flyte explicitly confirmed that he would pursue only his informed consent claim at trial, the trial court granted the Clinic's motion in limine to "exclude testimony regarding violations of the standard of care without sufficient evidence of proximate [cause]" (RP 49) and limited evidence of Abbigail's death to her premature birth and her death in February 2010. (RP 34, 41)

In direct violation of these orders in limine, plaintiff elicited testimony from many witnesses of the Clinic's alleged negligence, and made repeated references to Abbigail's death. (*See, e.g.*, RP 459-60, 652-53, 656, 971, 1072-73, 1077-78, 1385-86, 1655-56) Then, after the trial court granted the defense motion prior to closing

arguments to "[p]reclude the plaintiffs from arguing or inferring in their argument that Summit View Clinic was negligent . . . because there are no standard of care claims" (RP 1838-39) and explicitly "direct[ed] Mr. Beauregard not to argue negligence" (RP 1839), plaintiff's counsel repeatedly argued to the jury that the Clinic had been "way way negligent" because of "systemic failures." (RP 2007-14, 2109)

Plaintiff admits to eliciting testimony regarding the Clinic's standard of care, but argues that it "was properly admissible under ER 401 to prove that reasons why and how the Clinic and Dr. Marsh proximately caused the death of Katie Flyte." (Resp. Br. 23) To the contrary, plaintiff's deliberate injection of negligence principles into what was supposed to be a trial on the issue of informed consent demonstrates the prejudice caused by his misconduct.

By plaintiff's choice, this case went to trial a second time only for the noneconomic damages caused by the alleged failure of Dr. Marsh to obtain Ms. Flyte's informed consent. (CP 194, 196) In an informed consent claim, the plaintiff has the burden of proving that "injury resulted from health care to which the patient or his or her representative did not consent." RCW 7.70.030(3). To prove the failure to secure informed consent, the plaintiff must prove "[t]hat

the *treatment* in question proximately caused injury to the patient." RCW 7.70.050(1)(d) (emphasis added). An informed consent claim does not require that the plaintiff prove *what* proximately caused the physician's failure to provide informed consent, let alone that the physician's failure to do so was a breach of the standard of care.

In contrast, an action for a physician's misdiagnosis sounds in negligence – a claim that plaintiff in this case voluntarily dismissed, after losing on this theory presented to the jury in the first trial. Misdiagnosis is not the proximate cause of the plaintiff's injury in an informed consent claim. *See Backlund v. University of Washington*, 137 Wn.2d 651, 661-62 n.2, 975 P.2d 950 (1999). This is because "when a health care provider rules out a particular diagnosis based on the circumstances surrounding a patient's condition, including the patient's own reports, there is no duty to inform the patient on treatment options pertaining to a ruled out diagnosis." *Gomez v. Sauerwein*, 180 Wn.2d 610, 623, ¶30, 331 P.3d 19 (2014).

As the trial court recognized (12/1 RP 34), evidence of the Clinic's alleged systemic failures and improper protocols were relevant only to negligence – to *why* Dr. Marsh allegedly misdiagnosed Ms. Flyte. But such evidence had no bearing on whether Dr. Marsh conclusively ruled out H1N1 when diagnosing

Ms. Flyte or whether the *treatment* he provided proximately caused injury to her – the only proximate cause element at issue in an informed consent claim. Plaintiff cannot justify his repeated allegations of negligence after stating he would drop that claim and the trial court ordered that no evidence of negligence could go the jury.

Ignoring that it was plaintiff who initially, and in violation of orders in limine, injected negligence into what was supposed to be solely an informed consent case, plaintiff further claims that his counsel's improper closing argument was warranted because he "had every right to rebut [defense's] misleading assertions"[2] (Resp. Br. 28), and that "[a]s a matter of law, the lawyer for the opposing party may respond to a lawyer's statement in final argument containing facts that are outside the record." (Resp. Br. 28, citing *Safeco Ins. Co. of America v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 680 P.2d 409 (1984)).

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[2] As an example of these allegedly "misleading assertions," plaintiff contends that defense counsel "argu[ed] that the fact that Katie Flyte's parents, the Brehans, did not testify meant that they didn't support the case." (Resp. Br. 26-27 n.58) Although the defense did mention the Brehans (RP 2071), the plaintiff's objection was sustained and the defense did not make any argument or encourage the jury to draw any inferences regarding the Brehans' failure to testify.

In *Safeco*, the appellant's attorney in closing made statements, not supported by evidence, regarding when respondents' attorney became involved with certain matters. 37 Wn. App. at 17. Respondent's counsel addressed the same subject matter during his closing, advising the trial judge "that he was responding to what opposing counsel had said." *Safeco*, 37 Wn. App. at 18. The court rejected appellant's challenge to the trial court's failure to overrule appellant's objection to closing, as appellant's counsel not only opened the matter and argued it, but specifically told the jury that opposing counsel could respond. *Safeco*, 37 Wn. App. at 18.

Here, in contrast to *Safeco*, the defense was rebutting *plaintiff's* misleading negligence arguments in closing. Because plaintiff's counsel repeatedly argued that the Clinic had violated the standard of care (RP 2002-04, 2007-10, 2012-14), the Clinic was entitled to "respond[] to what opposing counsel had said." *Safeco*, 37 Wn. App. at 18.

2. The Clinic was substantially prejudiced by its inability to refute inadmissible evidence of dismissed claims.

Plaintiff never moved to reinstate his negligence claims, or his claims based on Abbigail's death, after the trial court accepted his explicit confirmation that he was abandoning them. The Clinic relied

on plaintiff's express representations to the court in putting on its defense, and as a consequence did not introduce evidence that would have been relevant to a standard of care or wrongful death claim. Plaintiff's contention that the Clinic was not prejudiced by his misconduct despite his flagrant arguments about the Clinic's alleged negligence and the introduction of such evidence in violation of court orders – is wholly without merit.

Even where a plaintiff moves to reinstate a dismissed claim, it is reversible error for the trial court to do so if, as here, it would prejudice the defense. In *Hubbard*, for instance, the trial court orally granted plaintiff's motion for voluntary dismissal of her claims, and trial went ahead solely on the defendant's counterclaim. At trial, the trial court excluded certain defense testimony that would have been relevant to its defense against the plaintiff's claims, but had become irrelevant when only the counterclaim was at issue. *Hubbard*, 68 Wn. App. at 886. After trial, the trial court granted plaintiff's motion to reinstate one of her claims and entered judgment for the plaintiff. *Hubbard*, 68 Wn. App. at 888. The Court of Appeals reversed, noting that if the defendant "had thought she still needed to rebut a claim which had been voluntarily dismissed at the time of her testimony on her counterclaim, her testimony would have been quite

different," and thus she was not given "a fair opportunity to rebut the reinstated claim." *Hubbard*, 68 Wn. App. at 890.

Here, too, the Clinic did not put on evidence to rebut a claim of negligence because the issue was no longer in the case, by plaintiff's own decision. (*See* 12/1 RP 7; RP 12, 49-50, 101-02) Mr. Flyte claims that the "mere mention of the word 'negligence' is not inherently prejudicial." (Resp. Br. 30) But plaintiff's repeated use of the word – and the concept – of negligence was no passing "mention." Violating the trial court's express admonition, counsel argued to the jury that the Clinic had been "way negligent," (RP 2109), repeatedly insinuating and arguing the Clinic's negligence throughout trial – just without the offending phrase. (*See* RP 971, 1385-86, 1655-56, 1953, 2011-14; 12/1 RP 34) This did not go unnoticed by the defense or the trial court – and likely not by the jury, either. Yet the trial court prevented the Clinic from rebutting plaintiff's claims of negligence in its own closing argument. (RP 2052-53)

The trial court sustained several defense objections (RP 2013-14, 2109-10) and at other times was forced to remind both plaintiff's counsel *and* the jury that negligence was not at issue. (*See* RP 971, 1386, 1656, 1953) The trial court itself acknowledged at the post-trial

hearing that "[t]he complaints about systemic failures and the failure to have proper protocol in a sense *were negligence arguments.*" (12/1 RP 34) (emphasis added) The fact that plaintiff waited until his rebuttal argument (when the defense would have no opportunity to respond) to use the word "negligence" does nothing but prove that the testimony elicited and inferences made were *in fact negligence arguments.*

Similarly, Mr. Flyte's contention that the defense was not prejudiced because he did not violate a single evidentiary objection that had previously been sustained (Resp. Br. 19, 25) is baseless. The fact that an objection is ultimately sustained in no way eliminates the prejudice that results from forcing counsel to make the objection, as counsel's misconduct still exposes the jury to inadmissible evidence and paints opposing counsel as seeking to hide the truth. *Teter*, 174 Wn.2d at 223, ¶30.

Finally, plaintiff's contention that the defense "failed to ask for a curative instruction" for these negligence arguments, and thus there "was no unfair prejudice" is both factually and legally faulty. (Resp. Br. 29-30) The defense repeatedly asked the trial court to clarify that only informed consent was before the jury. (*See* RP 2009, 2012-14) Regardless, misconduct is prejudicial where no instruction

to disregard it could have cured it – exactly the case here. *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967). Plaintiff *continued* to make these improper arguments even after the trial court sustained defense objections and reminded the jury that negligence was not at issue. (RP 2013-14, 2109-10) Clearly, a curative instruction could not have – and did not – cure plaintiff's misconduct.

C. Plaintiff's misconduct prevented the Clinic from having a fair trial, resulting in a punitive $16.7 million verdict.

1. Plaintiff improperly requested punitive damages to hold the Clinic "accountable."

Plaintiff improperly asked the jury to award damages to punish the Clinic and hold it "accountable" for its actions. Plaintiff's contention that he did not make a "golden rule" argument, relying on *A.C. v. Bellingham School Dist.*, 125 Wn. App. 511, 105 P.3d 400 (2004) (Resp. Br. 39), is a straw man. The Clinic never asserted that plaintiff made a "golden rule" argument, and (unlike here) an improper request for punitive damages was not at issue in *A.C.* Asking a jury what the value of a dollar means to them (the closing argument at issue in *A.C.*) is a far cry from asking the jury to award an amount, admittedly unrelated to the evidence, in order to "prove [a] point."

Despite telling the jury that an appropriate damage award would be $1 to $5 million, plaintiff's counsel then asked the jury to award Mr. Flyte "a dollar." (RP 2041) Counsel told the jury that Mr. Flyte had requested the nominal award "[b]ecause he doesn't care about the money; he cares about accountability." (RP 2041) By claiming that he was only asking for "a dollar", plaintiff's counsel admitted that the damages sought were not compensatory, as "a dollar" clearly bears no relation to a record that plaintiff's counsel believed warranted a six-figure award.

Rather, plaintiff's counsel charged the jury in making its damage award with "proving the point that the Summit View Clinic is responsible." (RP 2041) Plaintiff's counsel told the trial court that he was aware that the less he asked for as actual compensation, the "more likely [he was] to get accountability" – i.e., a larger award that "prov[ed] the point" that Summit View was responsible. (12/1 RP 20) This impermissible request for punitive, rather than compensatory, damages compels reversal and a new trial. *See Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 445, ¶75, 195 P.3d 985 (2008) (argument that damages should be awarded "so that what . . . happen[ed] to these [plaintiffs] will never happen again" was an improper request for punitive damages).

2. The excessive verdict is but one sign of its punitive nature, and of the effect of plaintiff's misconduct on the jury's passion and prejudice.

The jury's $16.7 million award in this case – following a trial where plaintiff was awarded nothing – was punitive, engendered by a jury inflamed with passion and prejudice, and clearly unsupported by the evidence or any special damages that could justify it. Plaintiff cites *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 699 P.2d 1230 (1985), to contend that this verdict is not excessive despite the dearth of evidence supporting it. But *Bingaman* does not stand for the proposition that jury verdicts are unreviewable. *Bingaman*'s holding is narrow: "The verdict of a jury does not carry its own death warrant solely by reason of its size." 103 Wn.2d at 838. Courts still have an obligation to review jury verdicts based on the entirety of the record. *See Bingaman*, 103 Wn. 2d at 835.

In *Bingaman*, a $412,000 award for pain and suffering was part of an overall $1 million verdict in a wrongful death and survival action. 103 Wn.2d at 832. The Court upheld the verdict, finding that the noneconomic damages were supported by substantial evidence and based on a record that had *no* instances of misconduct that might have prejudiced the jury against the defense.

Unlike here, the record in *Bingaman* contained substantial evidence to support the general damages award. The *Bingaman* Court found that the "facts as they pertain to the decedent's pain and suffering . . . *were sufficiently impressive,*" as the jury heard "*graphic and uncontested evidence* presented in that regard." 103 Wn.2d at 837 (emphasis added). "[S]ubstantial evidence was presented from which the jury could find that . . . [the decedent] not only suffered extreme *conscious* pain, fear and despair at not being helped, but also had the *conscious* realization her life and everything fine that it encompassed was prematurely ending." *Bingaman,* 103 Wn.2d at 837-38 (emphasis added).

In contrast, here the jury awarded Ms. Flyte's estate $5 million based on an "inference" of pain, despite no evidence she was suffering while in a medically induced coma. (12/1 RP 22-23) The trial court itself noted that "[t]here wasn't much evidence about the pain and suffering." (12/1 RP 22) Plaintiff relies on his testimony that he "heard [his] wife for the last time scream" when she was intubated and "then all of a sudden there was calm" (RP 649; Resp. Br. 42-43) but that suggests that Ms. Flyte's passing, though tragic, was without pain. The plaintiff offered no other evidence that Ms. Flyte suffered or was in pain. In particular, the trial court rejected

plaintiff's argument that this was evidence that Ms. Flyte knew that she was going to die or have an emergency C-section. (12/1 RP 22: court finding it "pretty doubtful that she knew that was going to happen.")

There was also scant evidence at trial regarding the Flytes' son Jacob, much less of his pain and suffering. Yet the jury returned a $6.7 million award to Jacob after plaintiff's counsel assured them that Jacob would not be able to touch the award until he is "way into adulthood." (RP 2040-41) The evidence that *was* introduced at trial was that Jacob was well-loved and well-adjusted. (RP 710-13) Plaintiff claims that he did not appeal to the passion and prejudice of the jury (Resp. Br. 45), and yet his emotionally charged appeal in asking for Jacob's award concluded with a quote on the irreplaceable bond of a mother. (RP 2036)

In *Bingaman*, the Court upheld the pain and suffering award after finding that "the record . . . discloses *nothing* to suggest that the jury was prejudiced against the defendants or that it was incited by passion to regard the defense case unfairly." 103 Wn.2d at 836 (emphasis added). In contrast, here the record is filled with examples of plaintiff's counsel introducing evidence in violation of orders in limine (*see, e.g.*, RP 459-60, 472, 652-53, 1385-86, 1655-

56), making improper arguments to the jury about claims not at issue (*see, e.g.*, RP 459-60, 472, 652-53), and requesting punitive damages. (*See* RP 2041-42)

Bingaman is also distinguishable from the present case given that the jury's verdict there included an award for economic damages. Courts routinely use economic awards to assess the reasonableness of the jury's award of noneconomic damages, to ensure that the damages are proportional to and compensatory for the injury sustained. *See, e.g.*, *Henderson v. Tyrrell*, 80 Wn. App. 592, 602, 632, 910 P.2d 522 (1996) ($2.5 million noneconomic damage award not excessive in light of nearly $1.2 million economic damages award where there was "nothing in the record to suggest the jury was prejudiced against [the defendant] or that it was incited by passion," and given the plaintiff's "unquestioned pain and suffering, as well as the serious and extensive injuries he sustained, many of which have continuing effects"); *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993) (comparing jury's award of special and general damages to determine whether noneconomic award was excessive); *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn.2d 165, 181-82, ¶29, 116 P.3d 381 (2005) (same); *Hoskins v.*

Reich, 142 Wn. App. 557, 571-72, ¶¶33-34, 36, 174 P.3d 1250 (same), *rev. denied*, 164 Wn.2d 1014 (2008).

For that reason, plaintiff misplaces his reliance on *Wuth ex rel. Kessler v. Laboratory Corp. of America*, 189 Wn. App. 660, 359 P.3d 841 (2015), *rev. denied*, 185 Wn.2d 1007 (2016), to argue that the verdict is not excessive. (Resp. Br. 47) The jury in *Wuth* awarded $25 million in special damages and $25 million in general damages. In reviewing the jury's verdict, the Court held that the $25 million noneconomic damages award was not excessive and was within the range of evidence. In coming to this conclusion, the Court specifically compared the general damages award to the one affirmed in *Bunch*, where the noneconomic damages "were roughly 75 percent of the amount of the awarded economic damages." *Wuth*, 189 Wn. App. at 705, ¶95.

Given that "the roughly 1 to 1 ratio of economic damages to noneconomic damages" in *Wuth* was "nowhere near the 10 to 1 ratio [the court] found shocking in *Hill*," this court in *Wuth* found that the noneconomic damages were not excessive, based on a *specific comparison* of the ratio between economic and noneconomic damages awards. 189 Wn. App. at 705, ¶ 95. In addition, the Court noted that the "jury heard emotionally-laden testimony . . . regarding

the emotional distress and mental anguish [plaintiffs] have sustained and will continue to endure." *Wuth*, 189 Wn. App. at 703-04, ¶92.

Here, however, there was virtually no testimony of Ms. Flyte's conscious pain and suffering or of Jacob's emotional distress and mental anguish – yet the jury awarded them $11.7 million. In addition, there are *no* special damages to which the Court could compare the noneconomic damages in determining whether they crossed the single-digit ratio threshold to become so excessive as to be punitive in nature, like those in *Hill*, 71 Wn. App. at 138, 140. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15, 128 S. Ct. 2605, 2634, 171 L. Ed. 2d 570 (2008) (single-digit maximum ratio of punitive to compensatory awards "is appropriate in all but the most exceptional of cases").

In the absence of evidence of special damages, the jury has very little guidance in determining what award of noneconomic damages is reasonable and proportional to the harm. The necessity for such scrutiny is apparent in the arbitrary numbers that plaintiff has suggested are appropriate for this case from time to time. Although his counsel told the jury that an appropriate award for Ms. Flyte's estate and Jacob Flyte would be $1 to $5 million each (RP 2040-42), plaintiff now claims that "[t]he verdict for Katie Flyte

should have been $10 million (or more)" (Resp. Br. 43), and that Jacob's "verdict should have been $10 million (or more)." (Resp. Br. 42) Plaintiff goes so far as to contend that "the Clinic is fortunate that the verdict was not $100 million." (Resp. Br. 46) This argument only highlights the arbitrary capriciousness of a pain and suffering award that is completely untethered to special damages, and why courts should scrutinize such awards carefully particularly, where, as here, the plaintiff has engaged in misconduct that includes a demand for punitive damages. *See* Arg. § C.1, *supra*. Such an award is not only impermissible under Washington law, but violates a defendant's due process rights. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519-20, 155 L. Ed. 2d 585 (2003).

The trial court's decision to uphold this verdict on this record arbitrarily deprived the Clinic of its due process rights, and compels reversal. A new trial is mandated.

III. CROSS RESPONSE ARGUMENT

A. Statement of Facts.

Kathryn Flyte sought treatment for her symptoms by a number of different healthcare providers in addition to the Clinic, including St. Joseph Medical Center, part of the Franciscan Health System ("Franciscan"). *Flyte v. Summit View Clinic*, 183 Wn. App.

559, 563, ¶4, 333 P.3d 566 (2014). (CP 21-40) Plaintiff settled with Franciscan for $3.5 million in September 2010, prior to filing this action in January 2011. (CP 23, 42, 1) The settlement released Franciscan from any claims that Mr. Flyte, Jacob, or the estates of Kathryn and Abbigail Flyte could assert, including claims arising from the deaths of Kathryn and Abbigail. (CP 405) Approximately one-third of the settlement was apportioned to Jacob Flyte, and two-thirds to Mr. Flyte. (CP 405) On September 10, 2010, Pierce County Superior Court Judge Elizabeth Martin had approved the minor settlement as reasonable under SPR 98.16W and RCW 4.22.060. (CP 405-06)

During the first trial, the trial court ruled that evidence of the Franciscan settlement was admissible under RCW 7.70.080. (CP 23, 26) Our Supreme Court held that such evidence was inadmissible in *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012), six days after the trial court had denied plaintiff's motion for a new trial. (CP 26) Following *Diaz,* this Court reversed and remanded for a new trial based on the admission of the settlement, as well as an erroneous jury instruction on informed consent. (CP 24, 26-27) *Flyte,* 183 Wn. App. at 565, ¶10.

Because evidence of the settlement was now inadmissible under *Diaz*, the defense argued before trial that it was entitled to a $3.5 million reduction of any verdict against it or, alternatively to allocate fault among the different healthcare providers under RCW 4.22.070. (RP 19-21; CP 41-47) The defense noted that "if the Court allowed [it] to elect offset, [it] would not need to present evidence of allocation of fault because that would already be taken care of there." (RP 20-21)

After extensive argument and briefing from the parties, the trial court granted the Clinic's motion for an offset.[3] (RP 103) Based on this ruling, the Clinic did not present evidence about proof of fault of any other entity. (RP 103) In its response to plaintiff's presentation of judgment, the Clinic argued that the court should find Franciscan's settlement to be reasonable. (CP 255-57) The trial court heard argument on November 6, 2015, on the issues of offset, the reasonableness of the settlement, and the entry of judgment.

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[3] In the last sentence of the "Conclusion" to the Respondent/Cross-Appellant's brief, plaintiff states that the "Clinic's lawyers should be sanctioned in accord with CR 11." (Resp. Br. 49) Plaintiff has not assigned error to the trial court's denial of his request for sanctions below, has not raised the denial of sanctions as an issue on review, and has not devoted any portion of his brief to a request for sanctions on appeal. That issue is waived. RAP 10.3(g); RAP 18.1(b) *See Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

(11/6 RP 1-33) The trial court then took under advisement the parties' arguments and briefing before determining the amount of the offset. (*See* 11/6 RP 30-32)

The trial court found the settlement reasonable under RCW 4.22.060. (CP 405-06) Because plaintiff had dismissed the wrongful death claim for Abbigail Flyte, the trial court ruled that "the portion of the $3.5 million settlement attributed to Abbigail's wrongful death would not be offset." (CP 406) After taking into consideration a number of factors, including the weakness of the claim for Abbigail's wrongful death, the trial court determined that "the claim for Abbigail's wrongful death was a minor part of the total settlement and probably had a settlement value of no more than $150,000." (CP 407) The trial court subtracted that amount from the $3.5 million settlement and offset the $16.7 million jury verdict by $3,350,000 – one-third ($1,116,666.67) against the $6.7 million verdict for Jacob, one-third against Mr. Flyte's $5 million award, and one-third against the $5 million award to Ms. Flyte's estate. (CP 407-09) The court entered judgment for $13.35 million on November 13, 2015. (CP 408-09)

B. The trial court did not err by granting the offset.

1. The trial court was authorized to grant an offset pursuant to RCW 4.22.060 and *Adcox*.

RCW 7.70.080, 4.22.060, and 4.22.070 "establish three different procedures for accounting for prior settlements in medical malpractice actions." *Diaz*, 175 Wn.2d at 468, ¶27. Under RCW 7.70.080, the jury may consider evidence of prior settlements to reduce any damages award by that amount. RCW 4.22.060 "delegates to the trial judge the task of deducting from any damage award the amount of any prior settlements," while RCW 4.22.070 "ignores the amount of any prior settlements and requires the trier of fact, usually the jury, to allocate fault . . . [and] liability for damages based on allocation of fault." *Diaz*, 175 Wn.2d at 469, ¶27.

In *Diaz*, our Supreme Court found that it was "impossible to give effect to all three statutes," and held that RCW 4.22.060 and .070 control because they are more specific than RCW 7.70.080. 175 Wn.2d at 469-70, ¶¶28, 30. The Court concluded that the trial court erroneously admitted evidence of a prior settlement under RCW 7.70.080 and that the settlement "should have been handled under the scheme set forth in [RCW 4.22.060 and .070] and explained in *Adcox*." *Diaz*, 175 Wn.2d at 470, ¶31.

Adcox v. Children's Orthopedic Hosp. and Med. Ctr, 123 Wn.2d 15, 864 P.2d 921 (1993) "considered the relationship between RCW 4.22.060 and 4.22.070." *Diaz*, 175 Wn.2d at 468, ¶25. In *Adcox*, the plaintiff filed suit against a hospital and two of its doctors after her infant son suffered cardiac arrest while in the defendant's care. The trial court "considered two alternative methods for determining how the Hospital's potential share of damages should be affected by the plaintiffs' prior settlements" with the two doctors. *Adcox*, 123 Wn. 2d at 22.

"One alternative was to have the jury allocate percentages of fault among the Hospital and the two doctors." *Adcox*, 123 Wn. 2d at 22. The "second alternative was to hold the Hospital responsible for the entire amount of the damages, then to offset the settlement amounts already paid by the doctors, those settlements already having been adjudged reasonable." *Adcox*, 123 Wn.2d at 22. Plaintiffs argued for offset and exclusion of evidence of fault, while the defendant "did not clearly commit itself on the allocation/offset issue." *Adcox*, 123 Wn.2d at 23.

The trial court ultimately "rejected allocation in favor of offset" and ruled that "the Hospital could not present expert evidence [that] the doctors violated any standard of care," but "did not entirely

foreclose the issue of the doctors' negligence." *Adcox*, 123 Wn.2d at 23. But because the hospital's theory of the case was that no one, including the hospital or its doctors, was negligent, it "did not attempt to introduce evidence, or make an offer of proof, that either of the two doctors had been negligent." *Adcox*, 123 Wn.2d at 23.

The jury awarded the plaintiffs over $10 million in damages, which the trial court offset by the amount the plaintiffs had received in settlement from the two doctors. *Adcox*, 123 Wn.2d at 24. On appeal, the hospital argued that the trial court erred in failing to allocate fault among the hospital and the physicians under RCW 4.22.070(1). *Adcox*, 123 Wn.2d at 24. The Court held that in light of the absence of any evidence from the hospital that the settling doctors were at fault, RCW 4.22.070 was not "self-executing." *Adcox*, 123 Wn.2d at 25; *see Diaz*, 175 Wn.2d at 468, ¶26. "Without a claim that more than one party is at fault, and sufficient evidence to support that claim, the trial judge cannot submit the issue of allocation to the jury." *Adcox*, 123 Wn.2d at 25. Because "the Hospital failed to claim its right to allocation by producing evidence of the fault of another party," the Court affirmed the trial court's decision to offset the settlement pursuant to RCW 4.22.060. *Adcox*, 123 Wn.2d at 25.

Adcox presumes that a jury will allocate fault to a settling party, but if it fails to do so, the result is that the plaintiff's claim "'is reduced' by a reasonable settlement or 'shall be reduced' by an amount found reasonable." *Diaz*, 175 Wn.2d at 469, ¶29 (quoting RCW 4.22.070 and noting that both RCW 4.22.060 and RCW 4.22.070 are "phrased in mandatory terms"). Here, the trial court followed *Adcox*, just as *Diaz* directed, and "considered two alternative methods for determining how the [defendant's] potential share of damages should be affected by the plaintiff's prior settlement[]" with Franciscan. *Adcox*, 123 Wn.2d at 22. (RP 19-32) The trial court did not err in granting the Clinic an offset.

2. The trial court satisfied due process in determining the reasonableness of the offset under RCW 4.22.060.

Under RCW 4.22.060(1), a hearing must be held "on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence." The court must then determine that the amount to be paid is reasonable. RCW 4.22.060(1). "If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party." RCW 4.22.060(1).

Mr. Flyte argues that he did not receive due process because the defense did not provide at least five days' notice before a reasonableness hearing, as set forth in 4.22.060(1). (Resp. Br. 14-15) Mr. Flyte also contends that the Clinic's motion for a reasonableness hearing was not timely under Pierce County Local Rule ("PCLR") 7, which requires a motion be noted six days prior to its hearing. (Resp. Br. 15)

But Mr. Flyte received far more process than he was due. Judge Martin approved the Franciscan settlement as reasonable considering substantially similar factors in 2010, long before this trial ever began, or this lawsuit was commenced. (CP 405-06) In any event, "untimely notice and hearing does not create prejudice *per se*." *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 38, 935 P.2d 684 (1997) (delayed notice and hearing for pretrial settlement not prejudicial where "trial court did not inappropriately consider post-settlement information when determining reasonableness").

The statute itself contemplates that a shorter timeframe may be appropriate. RCW 4.22.060(1) ("The court may for good cause authorize a shorter notice period.") The shortened notice period does not have to be "evidenced by a written court order," as "no such

language appears in the statute" requiring an order. *Pickett v. Stephens-Nelsen, Inc.*, 43 Wn. App. 326, 329-30, 717 P.2d 277 (1986) (less than five days' notice sufficient under RCW 4.22.060(1) where defendant had more than five days' actual notice of the hearing from earlier discussions of the matter, conversations between counsel, and where defendant neither "ask[ed] for additional time to prepare nor . . . object[ed] to the notice period at the hearing").

In addition, a trial court has the "inherent power to waive its [local] rules." *Raymond v. Ingram*, 47 Wn. App. 781, 784, 737 P.2d 314, *rev. denied*, 108 Wn.2d 1031 (1987), *superseded by statute on other grounds*. "Unless the record shows that an injustice has been done, this court will presume" that the trial court disregarded the local rules for a good reason. *Raymond*, 47 Wn. App. at 784.

Mr. Flyte had sufficient actual notice of the reasonableness hearing. Plaintiff moved for entry of judgment on October 28, 2015. (CP 219-32) At the November 6 hearing, the trial court considered the offset because the Franciscan settlement included Abbigail's wrongful death claims, which were not at issue in the second trial. (CP 405-07) The trial court had to determine what portion of the settlement was for Abbigail's claims, and reduce the offset accordingly prior to entering judgment. (CP 405-07)

In his motion for entry of judgment, Mr. Flyte extensively briefed the offset issue and addressed whether a reasonableness hearing was required (CP 219-32), just as both parties had before and throughout trial. (RP 19-32, 1802-09, 1985-88; CP 41-49, 111-113, 118-26, 184-192) The Clinic likewise argued that the settlement was reasonable in its brief opposing entry of judgment. (CP 246-258) Just like the party complaining on appeal in *Pickett*, Mr. Flyte had actual notice of the hearing from earlier discussions on the matter as well as numerous conversations between the court and counsel on the issue of offset during trial. He was thus on notice that the trial court would need to determine what amount of the verdict would be offset by the Franciscan settlement.

Moreover, plaintiff was not prejudiced by any failure to provide five days advance notice because he had the opportunity to submit additional evidence to the trial court for an entire week before the court issued its November 13 decision. At the hearing, the trial court expressly told the parties that it would consider any additional evidence and briefings submitted in support of their positions prior to determining how the offset would be applied. (11/6 RP 30-32)

Plaintiff's argument that he "never had an opportunity to argue the issues or factors" is without merit. (Resp. Br. 15) He had

ample notice that the reasonableness of the settlement was at issue as well as the trial court's willingness to take further evidence into consideration.

C. If this Court finds that the trial court erred in granting offset, it must remand for a new trial to determine allocation under RCW 4.22.070.

If this Court finds that the trial court erred in allowing an offset, it must remand for a new trial to determine allocation because there is sufficient evidence of other parties' fault to create an issue of fact for the jury. "Neither a trial court nor an appellate court may substitute its judgment for that which is within the province of the jury." *Blue Chelan, Inc. v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984); *see also Flyte*, 183 Wn. App. at 580, ¶44 (error to "remove[] a disputed issue of fact from the jury's consideration"); *Tabert v. Zier*, 59 Wn.2d 524, 530-31, 368 P.2d 685 (1962) (reviewing court cannot "substitute its judgment for that of the jury on disputed facts"). Unlike in *Adcox*, there is sufficient evidence here to submit the issue of allocation to the jury.

In *Adcox*, the defendant failed to preserve the issue by not producing any evidence of the doctors' fault – even though the trial court "did not entirely foreclose the issue of the doctors' negligence." 123 Wn.2d at 23. The Court could not remand for allocation because

there was no record from which the Court could determine "whether there was sufficient evidence to create an issue of fact about allocation for the jury." *Adcox*, 123 Wn.2d at 27.

Here, not only did the Clinic plead non-party fault as an affirmative defense (CP 16), it was prepared to pursue allocation by presenting evidence that its conduct was not the sole cause of plaintiff's damages until the trial court held it would grant an offset. (CP 83-95; *see* RP 19-20, 103, 1804-05) And unlike *Adcox*, the record contains evidence of other parties' fault. (*See* RP 698-706: plaintiff testifying how Good Samaritan initially failed to diagnose H1N1 when Ms. Flyte went to the ER and describing "problems" he had with her treatment at the hospital; RP 1517-18: Franciscan did not diagnose Ms. Flyte with H1N1 despite documenting a fever of 94 to 103 degrees the day before she visited the Clinic – information never shared with Dr. Marsh) This Court should not deprive the Clinic of its right to prove allocation of fault under RCW 4.22.070 because of the trial court's legal error.

Contrary to plaintiff's claims, the Clinic did not invite error by asking the trial court to grant an offset. (Resp. Br. 14) A party invites error if it requests an instruction or ruling that the trial court grants, and then challenges the ruling on review. *See Marriage of Morris*,

176 Wn. App. 893, 900, ¶15, 309 P.3d 767 (2013) ("The invited error doctrine prohibits a party from setting up an error below and then complaining of it on appeal."); *Nania v. Pacific Northwest Bell Telephone Co., Inc.*, 60 Wn. App. 706, 709, 806 P.2d 787 (1991) (invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal); *Ames v. Ames*, 184 Wn. App. 826, 849, ¶52, 340 P.3d 232 (2014) ("Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal."), *rev. denied*, 352 P.3d 187 (2015). Here, the trial court granted the Clinic's motion for an offset, and the Clinic does not argue on appeal that the trial court erred in doing so. To the contrary, the Clinic maintains that the trial court's ruling was proper. The alternative arguments advanced by the Clinic are applicable only if this Court finds that the trial court erred.

If the offset was improper, it is but one more reason to reverse and remand for a new trial at which the jury could consider the fault of non-parties. This Court cannot, as Mr. Flyte proposes (Resp. Br. 2, 14), authorize a double recovery by simply adding the $3.5 million offset onto the verdict. If this Court determines that the trial court

erred in granting offset, it should direct that allocation be addressed in the new trial required by the jurors' and plaintiff's misconduct.

IV. CONCLUSION

Summit View Clinic did not receive a fair trial. This Court should reverse and remand for a new trial.

Dated this 13th day of July, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 13, 2016, I arranged for service of the foregoing Reply Brief of Appellant/Cross-Appellant, to the court and to the parties to this action as follows:

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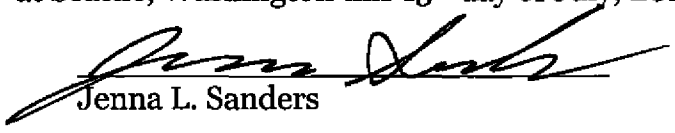

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